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In the Supreme Court of the United States

OCTOBER TERM, 1950

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 301

PAUL MOSER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 80-85) is reported at 85 F. Supp. 683. The opinion of the Court of Appeals (R. 88-93) is reported at 182 F. 2d 734.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1950 (R. 94). The petition for a writ of certiorari was filed on September 11, 1950.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a Swiss national, who, upon his voluntary application, was granted exemption from military service as a neutral alien, as permitted by Section 3(a) of the Selective Training and Service Act of 1940, is debarred from becoming a citizen of the United States, in accordance with the terms of that subsection.

STATUTE, REGULATION, AND TREATY PROVISION INVOLVED

The Selective Training and Service Act of September 16, 1940, c. 720, 54 Stat. 885, *et seq.*, as amended by the Act of December 20, 1941, c. 602, § 2, 55 Stat. 845, provided in pertinent part:

* * * * *

> Sec. 3 [50 U. S. C. App. 303]. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States [within specified age limits] shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in ac-

cordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

* * * * *

Sec. 16 [50 U. S. C. App. 316]. (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

* * * * *

Selective Service Regulation 622.43 (32 C. F. R. [1943 Cum. Supp.] 622.43) provided in pertinent part:

§ 622.43 *Class IV-C: Neutral aliens requesting relief from training and service* * * *.

* * * * *

(b) When an alien registrant who is a citizen or subject of a neutral country (see § 601.2) at any time prior to his induction into the land or naval forces of the United States files with his local board an Application by Alien for Relief from Military Service (Form 301) executed in duplicate, he shall be placed in class IV-C. * * *

Article II of the Convention of Friendship, Reciprocal Establishments, Commerce &c., between the United States and the Swiss Confederation, concluded November 25, 1850, and proclaimed No-

vember 9, 1855 (11 Stat. 587, 589), provides in pertinent part:

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.

* * * * *

STATEMENT

Petitioner, a 39-year old university graduate and a civil engineer (R. 10, 32, 45, 47), is a Swiss national and a native of Switzerland who first entered the United States as a visitor on July 6, 1937 (R. 10, 12, 29). On December 25, 1937, he went to Canada and was readmitted to the United States on December 29, 1937, as an immigrant for lawful permanent residence (R. 29). On March 9, 1938, he filed a declaration of intention to become a citizen in the United States District Court for the Eastern District of New York (R. 22). On May 11, 1940, he left the United States for Switzerland for the purpose of rejoining his unit in the Swiss Army, in which he held a reserve commission as First Lieutenant in the Corps of Engineers (R. 26, 51, 73, 80-81). Following this tour of duty in the Swiss Army, he reentered the United States on October 11, 1940, as a non-quota immigrant return-

ing to an unrelinquished domicile (R. 32, 68, 71). On March 27, 1942, he filed a petition for naturalization (R. 5-6), alleging that on October 19, 1940, he had married a native-born citizen of the United States, and claiming the exemptions granted to spouses of United States citizens under the general provisions of the Nationality Act of 1940 (8 U. S. C. 710 (b)). Having repeatedly failed to appear for a final hearing after being given due notices and warnings, his petition for naturalization was dismissed on July 5, 1945, for lack of prosecution (R. 7, 12).

On March 31, 1948, petitioner filed a new petition for naturalization (R. 12-13), again claiming the exemptions granted spouses of citizens under the Nationality Act of 1940. The case came on for hearing, before District Judge Kennedy of the District Court for the Eastern District of New York, on March 10, 1949 (R. 56-61), was continued on June 9, 1949 (R. 62-77), and was concluded on July 21, 1949, with petitioner being admitted to citizenship (R. 4, 78, 85). Petitioner was present and represented by counsel throughout these hearings, in the course of which the Immigration and Naturalization Service objected to the granting of the petition on the ground that petitioner was ineligible for citizenship, having incurred such disability under Section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra*, pp. 2-3), by applying for and being granted exemp-

tion from military service in the armed forces of the United States as a neutral alien (R. 56-79).

It was shown at the hearings that on February 26, 1944, petitioner executed, and filed with local Selective Service Board No. 14 in New York City, Form DSS 301, entitled "Application by Alien for Relief from Military Service" (R. 17-18, 56-57), and that in consequence thereof the local board placed him in Class IV-C (see Selective Service Regulation 622.43 (b), *supra*, p. 3), thereby relieving him from military service as a neutral alien (R. 16, 53-54). It further appeared at the hearings that the DSS 301 Form executed by petitioner was a "revised" form, in that the following acknowledgment—"I understand that the making of this application to be relieved from such liability [for military service] will debar me from becoming a citizen of the United States"—which appeared in the body of the old form (R. 19-21) above the space for the applicant's signature (see R. 19), did not appear in the new form (R. 17-18), which petitioner signed; and that, in lieu of the above-quoted acknowledgment, the revised form (R. 17-18) contained the following *caveat*, in the form of a footnote appearing below the space for the applicant's signature (see R. 18):

> Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provides in part "That any citizen or subject of a neutral country shall be relieved from liability for

> training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

There was also evidence that this revised form, containing no personal acknowledgment of future ineligibility for citizenship, had been prepared for use by nationals of countries having treaties with the United States guaranteeing reciprocal military exemption, in accordance with an agreement between officials of the Swiss Legation, the United States Department of State, and the Selective Service System of the United States (R. 34-39, 57-60).

It was contended on behalf of petitioner at the hearings that he was exempt from military service under the provisions of Article II of the 1850 Convention of Friendship, &c., between the United States and Switzerland (*supra*, pp. 3-4), irrespective of the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra*, pp. 2-3) (R. 57-59). The Government's contention was that petitioner's status was controlled by Section 3 (a) of the Selective Training and Service Act of 1940, as amended, irrespective of the 1850 treaty, and that the revision of Form DSS

301, by means of which he obtained exemption from military service, as provided by the Act, did not nullify or in any respect modify the legal implications of the exemption.

Evidence was adduced at the hearings that petitioner at various times sought deferment under the Selective Training and Service Act of 1940 on grounds other than his status as a neutral alien (R. 51-55, 71-72). On January 15, 1941, he executed a Selective Service Questionnaire wherein he requested a Class III or IV classification for the reasons that his wife was expecting a child, that he was a citizen of Switzerland, and that he had spent approximately two years in the armed forces of Switzerland in the capacity of a First Lieutenant in the Corps of Engineers (R. 41, 51-52). His local board originally classified him in Class III-A (dependency classification); but on January 11, 1944, changed his classification to I-A (available for military service) (R. 53). It was after this reclassification that he first began to seek, on January 24, 1944 (R. 26-27), information from the Swiss Consulate in New York in regard to deferment from military service because of his status as a neutral alien. Following affirmance by the reviewing body of his local board of his reclassification in Class I-A (R. 53), petitioner, on February 26, 1944, executed and filed Form DSS 301 (R. 17), on the basis of which he received, on February 28, 1944, a IV-C classification (R. 16, 53),

exempting him from military service as a neutral alien, in which group he remained until October 9, 1945, when he was reclassified IV-A (over age for military service) (R. 53, 55).

District Judge Kennedy, after asking petitioner whether he would have made the claim for exemption from military service as a neutral alien if he knew that thereby he would be debarred from United States citizenship, and receiving a negative answer (R. 74-75), made the following finding of fact (R. 77):

> It is my belief, and I find as a fact, that if in January, 1944, he had been told that the Swiss treaty was superseded by the Selective Service Act and that he must face the choice either of serving in the American Army or waive forever his right to become an American citizen, that he would have elected to do the former. Any other interpretation of these facts is impossible in light of the fact that he had an American wife and three children here.

Judge Kennedy, accordingly, found that petitioner never waived, or, at most, inadvertently waived, his right to naturalization by signing Form DSS 301 (R. 77, 85); overruled the Government's objection to his petition for naturalization; and admitted him to citizenship (R. 4, 85).

On appeal by the Government to the Court of Appeals for the Second Circuit, the order of the

District Court was reversed and the petition for naturalization was directed to be dismissed (R. 94).

ARGUMENT

1. Section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra*, pp. 2-3), made every male citizen of the United States and "every other male person residing in the United States," within specified age limits, subject to military service in the armed forces of the United States, with the *proviso* that "any citizen or subject of a neutral country" should be relieved from such liability if he made application for such relief, but on condition that any person so applying for relief from service should "thereafter be debarred from becoming a citizen of the United States." Petitioner contends (Pet. 8-9, 13-15) that these provisions of Section 3 (a), as applied to Swiss nationals residing in the United States, conflicted with Article II of the 1850 treaty between this country and Switzerland (*supra*, pp. 3-4), which exempts Swiss residents of this country (and American residents in Switzerland) from "personal military service" in the armed forces of the country of residence.[1]

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[1] The fact that when he applied for exemption from military service (see *supra*, pp. 6, 8-9) the petitioner's 1942 petition for naturalization was pending before the district court (see *supra*, p. 5) should be noted in connection with the following excerpts from the letter of June 5, 1942, from the Swiss Lega-

But there was no conflict. As the Court of Appeals pointed out (R. 90-91):

> While it is plain enough that the treaty did give [petitioner] immunity from such service, it is equally plain that it did not require him to take advantage of that immunity unless he so desired. * * * [T]he only express condition upon his acceptance of exemption was his liability for whatever pecuniary contributions were exacted from citizens in lieu of military service. This was evidently done to prevent discrimination against citizens and, we think, cannot be treated as an agreement that treaty nationals would be relieved from military service without affecting their status in other respects at all.

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tion to the Secretary of State, set out at pp. 24-27 of the petition for a writ of certiorari:

> . . . These nationals who have retained their original citizenship, and *who by not applying for naturalization have clearly demonstrated their intention of remaining citizens of their Mother country,* should, therefore, not only by generally recognized International Law, but also by Treaty, be exempt from any personal military service in the armed forces of the country of their residence.
>
> * * * * * *
>
> I have been, therefore, instructed by my Government to approach your Excellency and to request from you to intervene with the appropriate authorities, in order that *at least the Swiss citizens who have not declared their intention to become American citizens* may be unconditionally exempted from the liability for military service. [Italics supplied.]

The treaty is silent on the subject of the acquisition of citizenship by nationals of either country residing in the other and so far as we are presently informed that subject was not considered when the treaty was made. See 3 Hackworth, *Digest of International Law*, pp. 598-612. In our opinion this treaty is without significance in respect to the right of either country to impose what conditions it sees fit upon the admission to citizenship of nationals of the other. It follows that Section 3 (a) of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App. § 303 (a), did not, by granting exemption from military service to all neutral aliens and at the same time debarring all such who applied for it from ever becoming an American citizen, contravene the treaty.

2. Petitioner, however, urges that though he knowingly applied for and received exemption from military service, as permitted him under Section 3 (a) of the Selective Service Act, he should not be held to have incurred the naturalization disability expressly attached to the grant of exemption by the terms of that subsection (Pet. 16-23). However, none of the reasons advanced in support of the contention has merit.

(a) He argues that he obtained exemption from military service, not under the Act, but under the treaty of 1850, and that, since the treaty attaches no naturalization disability to the grant of exemp-

tion, the disability was not incurred (Pet. 16-17). It may be true, as the court below observed (R. 92), that he "*attempted* to obtain his exemption not under the [Act] but under the treaty" [italics supplied], and that "he did so because he wished to become an American citizen as well as to get exemption." But the fact remains that he applied for and obtained exemption under the Act. He signed Selective Service form DSS 301, entitled "Application by Alien for Relief from Military Service," filed it with his local board (R. 17-18), and in due course was classified IV-C—the Selective Service classification for neutral aliens requesting relief from military service (*supra,* p. 3) (R. 53, 54). This form contained, as a *caveat,* the admonition that the applicant would be thereafter debarred from citizenship under "Section 3 (a) of the Selective Training and Service Act of 1940, as amended" (*supra,* pp. 6-7; R. 18). Moreover, in the last analysis, it is immaterial whether relief from military service was accorded petitioner under the Act or under the treaty. For, once he accepted the benefit of the exemption, the Act operated to render him ineligible for future citizenship.

(b) Petitioner further argues (Pet. 20) that he did not "waive" his right to future citizenship,[2]

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[2] See pp. 6-7, *supra,* where it is pointed out that the "revised" DSS 301 form which he signed did not contain, as earlier forms had contained, an express acknowledgment that "the making of this application to be relieved from such lia-

and that his failure explicitly to make such a waiver is somehow relevant. But the Act did not make waiver of future citizenship rights a condition of the naturalization disability it imposed. It imposed that disability, as a matter of law, on all neutral aliens claiming the exemption from service which it authorized. Cf. *Savorgnan* v. *United States,* 338 U. S. 491, 499-502. Consequently, the fact that the application-for-exemption form which petitioner signed did not contain an express acknowledgment that he thereby waived all naturalization rights, and the fact that the Swiss Legation, in its letter to petitioner forwarding copies of that form for him to execute, said "Please note that, through filing of DSS Form 301, revised, you will not waive your right *to apply for* American citizenship papers" (R. 37, italics supplied), are without relevance. Significantly, moreover, the last sentence of the Legation's letter read, "The final decision regarding your naturalization will remain solely with the competent Naturalization Courts" (*ibid.*). The import of this sentence—that non-waiver by petitioner of future naturalization rights would not necessarily prevent his incurrence of the citizenship disability attached by law to his act of seeking exemption—could not have been

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bility [for military service] will debar me from becoming a citizen of the United States"; and that, in lieu of such an express acknowledgment, the "revised" form contained a *caveat* in the terms of Section 3 (a) of the Act.

lost on petitioner, who the record shows was a highly intelligent individual, who carefully sought a way of avoiding military service without at the same time incurring the naturalization disability which Congress attached to the act of applying for exemption.

On this aspect of the case, the court below, correctly in our view, observed (R. 92-93):

> We agree that [petitioner] waived no treaty rights when he applied for exemption. But we do not agree that on the facts here shown the government is estopped from enforcing the statute in this instance, assuming without deciding, that estoppel would, if shown, have such effect. So far as appears, all the government did was to relieve applicants for exemption from formally acknowledging in writing that they understood their application would prevent their becoming citizens and to leave the effect of their application to be decided as the law might require. That the Swiss Legation so understood is shown by the letter it sent [petitioner] advising him that filing the revised form would not be a waiver of his "right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts." This assurance from the Swiss Legation was at most only its own interpretation of the effect of [petitioner's] application for exemption from military service on his right to apply for citizenship. Even if "right to apply for" can be

> stretched to be synonymous with "right to obtain" citizenship that would not bind this government. And at the least it was a caveat that informed [petitioner] that in the end his right to citizenship would be determined by the proper court.

(c) It is urged (Pet. 17-19) that since petitioner was mistaken in thinking that he could apply for and obtain relief from military service as a neutral alien, and at the same time remain eligible for naturalization,[3] he should be relieved of the consequences of his mistake on equitable principles, and should not now be held to have incurred the naturalization disability which Congress attached to his act of applying for military exemption. Such a contention is foreclosed by *Savorgnan* v. *United States,* 338 U. S. 491, 499-502, where this Court held that the voluntary doing of an act by an American citizen, which Congress has declared to be an act of expatriation, is not saved from that legal consequence by the fact that the doer of the act mistakenly believed that that consequence would not attach.[4] Here, as in the expatriation

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[3] The District Court found that if petitioner had realized that "he must face the choice either of serving in the American Army or waive forever his right to become an American citizen, • • • he would have elected to do the former" (*supra*, p. 9), and we shall assume that this finding was correct.

[4] The District Court in the *Savorgnan* case "found as a fact that, at the time of signing each of the documents men-

statute there considered, "There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them" (338 U. S. at 499-500).

3. Finally, petitioner contends that the naturalization disability which he incurred in 1944 by successfully seeking military exemption as a neutral alien failed to survive the expiration of Section 3 (a) of the 1940 Selective Act on March 31, 1947, so that he is now, and was in 1948, when he filed his latest naturalization petition (*supra*, p. 5), eligible for naturalization (Pet. 20-23). This identical contention was rejected in *Benzian* v. *Godwin*, 168 F. 2d 952, 956-957 (C.A. 2), certiorari denied, 335 U. S. 886, and is clearly without merit. The disability imposed by Section 3 (a) was a *personal* disqualification for citizenship, personally incurred by all neutral aliens who took advantage of the exemption provisions of the subsection. It cannot be removed otherwise than by another Act of Congress specifically so providing. It is plain from the terms of Section 3 (a) that Congress intended the naturalization bar to be permanent, and

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tioned [an application for Italian citizenship and an oath of allegiance to the King of Italy], the petitioner, although intending to obtain Italian citizenship, had no intention of endangering her American citizenship or of renouncing her allegiance to the United States" (338 U. S. at 495). Compare the District Court's finding in the instant case, fn. 3, *supra*, p. 16.

not merely for the duration of the life of the Act. This manifest congressional intent is not lightly to be frustrated by an ultra-technical reading of the expiration provisions of the Act (§ 16 (b), see Pet. 4-5). For a more detailed discussion of this point, see the petitioner's reply brief in *McGrath* v. *Kristensen*, No. 34, this Term.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court, and should therefore, it is respectfully submitted, be denied.

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